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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 CARLOS DIAZ,

9 Petitioner,

10 v.

11 STEPHEN SINCLAIR,

12 Respondent.

CASE NO. C17-1446 JLR-BAT

**REPORT AND  
RECOMMENDATION**

13 **INTRODUCTION**

14 On September 22, 2017, Carlos Diaz filed an application to proceed *in forma pauperis*  
15 (IFP)<sup>1</sup> and a proposed habeas corpus petition. Dkt. 1. Mr. Diaz challenges his incarceration at the  
16 Washington Corrections Center on the basis of a miscalculated state sentence and community  
17 custody. *Id.* It is unclear whether Mr. Diaz is attempting to proceed under 28 U.S.C. § 2241, or §  
18 2254. However, because Mr. Diaz is not entitled to relief under either section, the Court  
19 recommends his habeas corpus petition be dismissed with prejudice.

20 **BACKGROUND**

21 Mr. Diaz's petition alleges that Mr. Diaz was convicted of Assault in the Third Degree  
22 and sentenced on January 1, 2015, in King County Superior Court, case number 13-1-11735-1-  
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<sup>1</sup> By separate order, Mr. Diaz has been granted leave to proceed *in forma pauperis*. Dkt. 4.

1 SEA. *Id.* at 13. The original Judgement and Sentence did not reflect a term of Community  
2 custody. *Id.* at 15. Mr. Diaz did not appeal his conviction or sentence. *Id.* After his release from  
3 prison on February 5, 2016, Mr. Diaz appeared in front of a state court judge to address the issue  
4 of community custody. *Id.* At the hearing, the state court judge amended the Judgement and  
5 Sentence in case number 13-1-11735-1-SEA to include a term of 12 months of community  
6 custody. *Id.*

7 Several months later, Mr. Diaz was arrested and charged with Robbery in the Second  
8 Degree; he subsequently pled guilty to a reduced charge. *Id.* at 16. After he served his robbery  
9 sentence, Mr. Diaz reported to his community corrections officer and was taken into custody. *Id.*  
10 at 17. The robbery conviction resulted in a revocation of community custody time imposed in  
11 case number 13-1-11735-1-SEA, and Mr. Diaz was placed back into prison on May 2, 2017, to  
12 serve an additional 500 days of imprisonment. *Id.* Although unclear, it appears Mr. Diaz alleges  
13 that the term of community custody imposed in case number 13-1-11735-1-SEA is improper and  
14 that the Department of Corrections miscalculated the amount of time he should serve. Due to  
15 these errors, Mr. Diaz contends he is being held in custody longer than he should be. *Id.*

16 After his community custody revocation, Mr. Diaz filed a Personal Restraint Petition  
17 (“PRP”) in the Washington Court of Appeals, Division I in January 2017.<sup>2</sup> *See also* Dkt. 1. The  
18 Court of Appeals terminated review of the PRP and filed its decision on April 20, 2017. The  
19 Court of Appeals subsequently issued a certificate of finality on June 23, 2017. Mr. Diaz did not  
20 seek review of the Court of Appeals’ decision in the Washington State Supreme Court.

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<sup>2</sup> The Court takes judicial notice of Mr. Diaz’s appellate case history located on the Washington Courts case records website, <https://dw.courts.wa.gov>.

## DISCUSSION

Mr. Diaz seeks federal habeas corpus relief using a form entitled “Petition for Writ of Habeas Corpus under 28 U.S.C § 2241.” The form has been altered to include “§ 2254.” Because it is unclear whether Mr. Diaz intends to proceed under § 2241 or § 2254, both grounds are addressed here.

### A. Section 2241

To the extent that Mr. Diaz seeks § 2241 habeas relief, it is not available to him in this case. Mr. Diaz is a state prisoner, and § 2254 is the exclusive avenue for a state court prisoner to challenge the constitutionality of his detention, even when the petition only challenges the execution of the sentence and not the underlying conviction itself. *White v. Lambert*, 370 F.3d 1002, 1005 (9th Cir. 2004) (adopting the majority view that distinguishes between a *federal* prisoner’s ability to resort to § 2241 to attack the execution of a sentence and the structural differences in the habeas statutes that make a state prisoner’s resort to § 2241 improper to challenge the execution of a state sentence). Mr. Diaz may not, therefore, obtain habeas relief as to the execution of his Washington state sentence under § 2241.

### B. Section 2254

Mr. Diaz is also precluded from habeas relief under §2254 because he failed to exhaust his state remedies. A petitioner must properly exhaust state remedies before seeking a federal writ of habeas corpus. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To properly exhaust, the petitioner must give the state court a fair opportunity to correct the alleged violation of federal constitutional rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). This means that the prisoner must fairly present his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.

1 *Baldwin*, 541 U.S. at 29; *see also Picard v. Connor*, 404 U.S. 270, 276-78 (1971); *O’Sullivan v.*  
2 *Boerckel*, 526 U.S. 838 (1999). The petitioner bears the burden to prove a claim has been  
3 properly exhausted. *Lambrix v. Singletary*, 520 U.S. 518, 523-24 (1997). “Exhaustion requires  
4 the petitioner to ‘fairly present’ his claims to the highest court of the state.” *Cooper v. Neven*,  
5 641 F.3d 322, 326 (9th Cir. 2011). A party seeking Washington Supreme Court review must file  
6 a petition within 30 days after the Court of Appeals decision is filed. RAP 13.4.

7 Under these standards, Mr. Diaz has failed to properly exhaust his state remedies. Mr.  
8 Diaz filed a PRP with the Washington Court of Appeals, but presents no evidence that he sought  
9 review, in the Washington Supreme Court, of the Court of Appeals’ denial of his claims. The  
10 Court of Appeals filed its decision denying Mr. Diaz’s PRP on April 20, 2017. To properly  
11 exhaust his habeas claims Mr. Diaz is required to them to the highest state court. Here however,  
12 there is nothing showing Mr. Diaz sought Washington Supreme Court review of the Court of  
13 Appeals’ denial of his PRP. Additionally, at this point Mr. Diaz cannot seek Washington  
14 Supreme Court review because a petition for Washington Supreme Court review must be filed  
15 within 30 days of the Court of Appeals’ decision under RAP 13.4. Because the Court of Appeals  
16 denied Mr. Diaz’s PRP on April 20, 2017, the time by which he was required to seek review in  
17 the Washington Supreme Court has long lapsed. Consequently, Mr. Diaz’s claims are not only  
18 unexhausted, but they are also procedurally barred. Because Mr. Diaz’s claims are procedurally  
19 barred, his §2254 should be dismissed.

## 20 **CERTIFICATE OF APPEALABILITY**

21 If the district court adopts the Report and Recommendation, it must determine whether a  
22 certificate of appealability (“COA”) should issue. Rule 11(a), Rules Governing Section 2254  
23 Cases in the United States District Courts (“The district court must issue or deny a certificate of

1 appealability when it enters a final order adverse to the applicant.”). A COA may be issued only  
2 where a petitioner has made “a substantial showing of the denial of a constitutional right.” *See* 28  
3 U.S.C. § 2253(c)(3). A petitioner satisfies this standard “by demonstrating that jurists of reason  
4 could disagree with the district court’s resolution of his constitutional claims or that jurists could  
5 conclude the issues presented are adequate to deserve encouragement to proceed further.”  
6 *Wilson-El v. Cockrell*, 537 U.S. 322, 327 (2003).

7 The Court recommends that Mr. Diaz not be issued a COA. No jurist of reason could  
8 disagree with this Court’s evaluation of his habeas claims or would conclude that the issues  
9 presented deserve encouragement to proceed further. Mr. Diaz does not have an available  
10 remedy under § 2241, and he is procedurally defaulted from habeas relief under § 2254. Mr.  
11 Diaz should address whether a COA should issue in his written objections, if any, to this Report  
12 and Recommendation.

### 13 CONCLUSION

14 For the reasons above, the Court recommends **DENYING** Mr. Diaz’s habeas petition and  
15 **DISMISSING** it with prejudice. The Court further recommends **DENYING** the issuance of a  
16 certificate of appealability.

17 Any objections to this Recommendation must be filed and served upon all parties no later  
18 than **November 1, 2017**. The Clerk should note the matter for **Friday, November 3, 2017**, as  
19 ready for the District Judge’s consideration. Objections and responses shall not exceed ten (10)  
20 pages. The failure to timely object may affect the right to appeal.

21 DATED this 11th day of October, 2017.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge